AM FINANCE BHD

v.

NG THIAM SENG & ANOR

COURT OF APPEAL, PUTRAJAYA
ZAINUN ALI JCA
RAMLY ALI JCA
AZHAR MA'AH JCA
[CIVIL APPEAL NO: W-02-146-2009]
17 AUGUST 2010

CIVIL PROCEDURE: *Disposal of action without trial - Disposal of case on point of law - Appeal against - Fact in dispute - Whether full trial warranted - Rules of the High Court 1980, O. 14A*

This was an appeal by the appellant bank against the decision of the High Court under O. 14A Rules of the High Court 1980 ('O. 14A') declaring that the respondents were not liable to pay the appellant any sum that the appellant had paid to the developer after the date of the property's completion had lapsed. The respondents' claim against the appellant arose from a loan agreement between them and the appellant, whereby the appellant had financed the purchase of a condominium unit by the respondents from the developer *vide* a sale and purchase agreement ('SPA'). The completion date in the SPA was 36 months from the date of execution of the SPA. In seeking the declaration at the High Court, the respondents claimed that the appellant had breached its contractual and fiduciary duty. The appellant, however, averred that it had performed its contractual obligation under the loan agreement and that it had no fiduciary duty to the respondents.

Held (allowing the appeal with costs)
Per Ramly Ali JCA delivering the judgment of the court:

(1) The respondents, on the facts, claimed that the appellant was in breach of its contractual and fiduciary duty when it continued to release progressive payments to the developer, although the 36-month completion period had lapsed and despite the fact that the respondents had orally notified and instructed the appellant not to do so. The appellant, on the other hand, denied that it had ever received such notification

A or instruction. This fact, the existence of which was relevant to the issue of breach of the appellant's contractual or fiduciary duty as alleged by the respondents, was disputed and, thus, needed to be ventilated in full trial. On this disputed fact, the court was satisfied that this case was not
B suitable for determination under O. 14A.

[Order of High Court set aside; case remitted to High Court for full trial.]

C ***Bahasa Malaysia*** *Translation Of Headnotes*

Ini adalah rayuan oleh perayu bank terhadap keputusan Mahkamah Tinggi di bawah A. 14A Kaedah-Kaedah Mahkamah Tinggi 1980 ('A. 14A') yang mengisytiharkan bahawa responden-responden tidak bertanggungjawab untuk membayar perayu apa-
D apa jumlah yang perayu telah membayar kepada pembangun selepas tarikh penyempurnaan hartanah telahpun luput. Tuntutan responden-responden terhadap perayu timbul dari suatu perjanjian pinjaman di antara mereka dan perayu, di mana perayu telah membiayai pembelian satu unit kondominium oleh responden-
E responden dari pembangun melalui suatu perjanjian jual beli ('PJB'). Tarikh penyempurnaan dalam PJB adalah 36 bulan dari tarikh pelaksanaan PJB. Dalam menuntut pengisytiharan di Mahkamah Tinggi, responden-responden menghujah bahawa perayu telah melanggar tanggungjawab kontraktual dan fidusiarinya. Perayu,
F walau bagaimanapun, menghujah bahawa ia telah melaksanakan tanggungjawab kontraktualnya di bawah perjanjian pinjaman dan bahawa ia tidak mempunyai tanggungjawab fidusiari kepada responden-responden.

G **Diputuskan (membenarkan rayuan dengan kos)**
Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Responden-responden, berdasarkan fakta-fakta, menghujah
H bahawa perayu telah melanggar tanggungjawab kontraktual dan fidusiarinya bila ia terus melepaskan pembayaran progresif kepada pembangun, walaupun tempoh penyempurnaan selama 36 bulan telah luput dan meskipun hakikat bahawa responden-responden telah memberitahu dan mengarahkan perayu secara
I lisan untuk tidak berbuat demikian. Perayu, sebaliknya, menafikan bahawa ia pernah menerima pemberitahuan atau

arahan sebegitu. Fakta ini, yang mana kewujudannya adalah relevan kepada isu pelanggaran tanggungjawab kontraktual atau fidusiari perayu seperti yang dikatakan oleh responden-responden, dipertikaikan dan, oleh itu, perlu dihujahkan dalam perbicaraan yang penuh. Berdasarkan fakta yang dipertikaikan ini, mahkamah ini berpuas hati bahawa kes ini tidak sesuai ditentukan di bawah A. 14A.

[Perintah Mahkamah Tinggi diketepikan; kes diremitkan ke Mahkamah Tinggi bagi perbicaraan penuh.]

Legislation referred to:
Rules of the High Court 1980, O. 14A

For the appellant - Abu Bakar Jais; M/s Hisham, Sobri & Kadir
For the respondents - Dato' Harpal Singh Grewal; M/s AJ Ariffin Yeoh & Harpal

[Appeal from High Court, Kuala Lumpur; Suit No: D8-22-507-2004]

[Editor's note: For the High Court judgment, please see Ng Thiam Seng & Anor v. Am Finance Bhd [2009] 10 CLJ 390.]

Reported by Suresh Nathan

JUDGMENT

Ramly Ali JCA:

[1] This is an appeal by the appellant against the decision of the High Court under O. 14A Rules of the High Court 1980 (RHC) in declaring that the respondents are not liable to pay the appellant any sum that the appellant had paid to the developer after the date of completion of the property had lapsed.

[2] The respondents claim against the appellant arose from a loan agreement between the respondents and the appellant bank whereby the appellant had financed the purchase of a unit of condominium by the respondents from the developer, Syarikat Usaniaga Sdn Bhd *vide* a sale & purchase agreement (SPA) dated 16 September 1995.

[3] The completion date as agreed in the SPA was 36 months from the execution date of the said SPA.

[4] For the purchase, the respondents made an application to the appellant for an end-financing facility. The facility of RM155,220.30 was granted.

[5] On 13 December 1995, the respondents and the appellant entered into a deed of assignment (DOA) whereby the appellant is authorised to disburse the loan directly to the developer after obtaining certificates relating to the stages of construction of the property; and the appellant is under no obligation or liability under the SPA by reason of the DOA except to make progress payments of the loan to the developer.

[6] The appellant released the final 20% of the purchase price to the developer after obtaining the relevant architect certificate. This was done after the completion dated had lapsed and without deduction of LAD. The respondents claimed that such releases were unauthorised and the respondents were not liable for them.

[7] On 19 March 2004, the Kuala Lumpur Sessions Court had entered judgment in default (JID) against the respondents in favour of the appellant for their failure to pay the loan facility.

[8] In the present case, in seeking the said declaration at the High Court, the respondents claimed that the appellant was in breach of its contractual and fiduciary duty by continuing to release the progressive payments to the developer although the 36 months period for completion had lapsed and despite the fact that the respondents had orally notified and instructed it not to do so.

[9] The appellant on the other hand contended that it has not breached its obligation under the loan agreement and has performed its contractual obligation under the loan agreement that is to remit the loan sum to the developer for the purchase of the property upon receiving architect certificate certifying the stage of completion and the amount to be paid. The appellant further contended that it has no fiduciary duty to the respondents.

Findings Of The Court

[10] The strength of the respondents claim is that the appellant was in breach of its contractual and fiduciary duty when it continued to release the progressive payments to the developer although the 36 months completion period had lapsed and that despite the fact that the respondents had orally notified and instructed the appellant not to do so. The appellant denied that it was ever notified or instructed by the respondents not to continue with the progressive payments as alleged by the

respondents. This fact is disputed. The existence of this fact is relevant to the issue of breach of contractual or fiduciary duty on the part of the appellant as alleged by the respondents.

[11] Section 6.03 and 3.02 of the related deed of assignment (DOA) authorises the appellant to pay the progressive payments to the developer upon receiving the architect certificate certifying the stage of completion and the amount to be paid. However, there is no express provision in the document to prohibit the appellant from making such payments after the developer failed to complete and deliver the property within the stipulated 36 months period ie, after the lapse of the completion date. The respondents claimed that they had orally notified the appellant on the matter and had orally instructed the appellant not to make further progressive payments. Therefore the issue of this "oral notification" and "oral instruction" is relevant and must be proved and need to be ventilated in full trial.

[12] On this disputed fact, the court is satisfied that this case is not suitable for a determination under O. 14A Rules of the High Court 1980. Therefore the appeal must be allowed with costs to be in the cause and that the order of the High Court be set aside and the case be remitted to the High Court for full trial.